Malayan Banking Bhd v Yatin bin Mahmood

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–282 OF 2010
MOHD HISHAMUDIN, ANANTHAM KASINATHER AND LIM YEE LAN JJCA
14 MARCH 2013

Banking — Banker and customer — Duty of care — Monies withdrawn from respondent's bank account with appellant pursuant to mandate issue by respondent to appellant and first defendant — Whether appellant's failure to make inquiry when substantial sums were withdrawn from respondent's account over two days amounted to breach of duty of care — Whether respondent had established breach of duty of care — Whether appellant liable in negligence

Yatin bin Mahmood ('the respondent') had a housing loan with Bank Bumiputra Malaysia Bhd ('BBMB'). In 1999, he decided to refinance his housing loan with Malaysian Banking Bhd ('the appellant'). The first defendant was the respondent's solicitor for the purpose of the refinancing transaction. As part of the refinancing exercise, the appellant granted the respondent a RM500,000 loan, which the latter deposited into a personal current account ('the account') that he had opened with the appellant bank on 6 May 1999. On 10 May 1999, the respondent issued a mandate to the appellant authorising the first defendant to operate his account. This mandate included, inter alia, the right to make withdrawals from the respondent's account. The first defendant utilised RM227,480.13 from the RM500,000 in the account to pay BBMB to redeem the property, charged to BBMB. The balance sum of RM272,519.87 in the account was subsequently withdrawn by the first defendant without the respondent's knowledge. When the respondent discovered these withdrawals, he threatened to lodge a police report. The parties then reached an amicable settlement whereby the first defendant bought the respondent's house that was charged to the appellant bank by way of a loan from Standard Chartered Bank ('SCB'). SCB issued a cashier's order for the redemption sum to the appellant bank and another cashier's order for RM439,939.07 to the respondent. The respondent's cashiers' order was paid into his account with the appellant bank. Thereafter the first defendant made two cash withdrawals of the entire sum of RM439,939 from the respondent's account. The respondent filed an action against the first defendant in the tort of fraud and against the appellant bank in the tort of negligence. The second defendant was the first defendant's partner in the legal firm known as Messrs Madzhar Mohd Sapuan & Co. As the respondent had obtained default judgment against the first and second defendants, the trial focused solely on determining whether the appellant bank was liable in negligence. The

respondent contended that the appellant bank owed him a duty as its customer for the sums of money withdrawn from the account by the first defendant. By way of this action the respondent sought to recover his losses from the appellant. The trial judge found that although the appellant was contractually bound to obey the respondent's mandate empowering the first defendant to operate the account, the substantial sums withdrawn by the first defendant over just two days should have caused it to make an inquiry with the respondent. It was thus the trial judge's opinion that the appellant bank's failure to make this inquiry was a breach of the duty of care it owed to the respondent. Hence the appellant was held to be liable in negligence. This was the appellant bank's appeal against that decision.

Held, allowing the appeal with costs:

(1) The appellant was contractually obliged to observe the unconditional mandate given by the respondent to the appellant bank and the first defendant at the time when the respondent opened his account with the appellant. Any non-observance of the mandate by the appellant would amount to a breach of contract by the appellant. In the present case, the appellant could not question any act carried out by the first defendant under the mandate without proper grounds (see paras 3 & 32).

(2) In arriving at his decision that the appellant had acted in breach of the duty of care it owed to the respondent, the trial judge had relied on two English cases, which dealt with payments made on stolen cheques and did not concern customers' mandate. Hence these two cases were irrelevant (see para 33).

(3) In the present case the respondent had not shown sufficient evidence of any misuse of authority by the first defendant or of any unusual circumstances to cause the appellant to question the exercise by the defendant of his right to make the withdrawals pursuant to the mandate. Thus the respondent had not established any breach of any duty of care on the part of the appellant bank when the latter honoured the withdrawals made by the first defendant without making any inquiry. As such, the respondent's action against the appellant had to be dismissed (see para 35).

[Bahasa Malaysia summary

Yatin bin Mahmood ('responden') mempunyai pinjaman perumahan dengan Bank Bumiputra Malaysia Bhd ('BBMB'). Pada tahun 1999, dia membuat keputusan untuk membiayai semula pinjaman perumahannya dengan Malayan Banking Bhd ('perayu'). Defendan pertama adalah peguamcara responden bagi tujuan transaksi pembiayaan semula itu. Sebagai sebahagian daripada amalan pembiayaan semula itu, perayu telah memberikan responden pinjaman RM500,000, yang didepositkan oleh responden ke dalam akaun

semasa peribadi ('akaun tersebut') yang telah dibukanya dengan bank perayu pada 6 Mei 1999. Pada 10 Mei 1999, responden telah mengeluarkan mandat kepada perayu memberi kuasa kepada defendan pertama untuk mengendalikan akaunnya. Mandat ini termasuklah, antara lain, hak untuk membuat pengeluaran daripada akaun responden. Defendan pertama telah menggunakan RM227,480.13 daripada RM500,000 dalam akaun itu untuk membayar BBMB untuk menebus hartanah itu, yang dicagarkan kepada BBMB. Jumlah baki RM272,519.87 dalam akaun itu kemudian telah dikeluarkan oleh defendan pertama tanpa pengetahuan responden. Apabila responden mengetahui tentang pengeluaran-pengeluaran tersebut, dia mengugut untuk membuat laporan polis. Pihak-pihak telah mencapai penyelesaian secara baik di mana defendan pertama telah membeli rumah responden yang telah dicagarkan kepada bank perayu melalui pinjaman daripada Standard Chartered Bank ('SCB'). SCB telah mengeluarkan cashier's order untuk jumlah penebusan kepada bank perayu dan satu lagi pesanan juruwang untuk RM439,939/07 kepada responden. Cashier's order responden telah dibayar ke dalam akaunnya dengan bank perayu. Selepas itu defendan perama telah membuat dua pengeluaran tunai untuk kesemua jumlah RM439,939 daripada akaun responden. Responden telah memfailkan tindakan terhadap defendan pertama dalam tort penipuan dan terhadap bank perayu dalam tort kecuaian. Defendan kedua adalah rakan kongsi defendan pertama dalam firma guaman dikenali sebagai Tetuan Madzhar Mohd Sapuan & Co. Oleh kerana responden telah mendapat penghakiman ingkar terhadap defendan-defendan pertama dan kedua, perbicaraan memberi fokus khusus kepada menentukan sama ada bank perayu bertanggungjawab kerana kecuaian. Responden berhujah bahawa bank perayu mempunyai kewajipan terhadapnya sebagai pelanggannya untuk jumlah wang yang dikeluarkan daripada akaun oleh defendan pertama. Melalui tindakan ini responden memohon untuk mendapat balik kerugiannya daripada perayu. Hakim perbicaraan mendapati bahawa meskipun perayu terikat secara kontraktual untuk mematuhi mandat responden yang memberikan kuasa kepada defendan pertama untuk mengendalikan akaun itu, jumlah besar yang dikeluarkan oleh defendan pertama dalam tempoh dua hari patut menyebabkannya membuat inkuri dengan responden. Oleh itu pendapat hakim perbicaraan bahawa kegagalan bank perayu membuat inkuiri ini adalah pelanggaran kewajipan berjaga-jaganya kepada responden, justeru perayu didapati bertanggungjawab kerana kecuaian. Ini adalah rayuan bank perayu terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Perayu mempunyai tanggungjawab secara kontraktual untuk mematuhi mandat tanpa syarat yang diberikan oleh responden kepada bank perayu dan defendan pertama pada masa responden membuka akaunnya dengan perayu. Apa-apa ketidakpatuhan mandat itu oleh perayu membentuk pelanggaran kontrak oleh perayu. Dalam kes ini, perayu

tidak boleh mempersoalkan apa-apa perbuatan yang dilakukan oleh defendan pertama di bawah mandat itu tanpa alasan-alasan wajar (lihat perenggan 31 & 32).

(2) Dalam membuat keputusan bahawa perayu telah bertindak melanggar kewajipan berjaga-jaganya terhadap responden, hakim perbicaraan telah bergantung kepada dua kes Inggeris, berhubung bayaran-bayaran yang dibuat dengan cek-cek yang dicuri dan tidak berkaitan mandat pelanggan. Justeru dua kes tersebut adalah tidak relevan (lihat perenggan 33).

(3) Dalam kes ini responden tidak menunjukkan keterangan mencukupi berhubung apa-apa kuasa yang disalahgunakan oleh defendan pertama atau berhubung apa-apa keadaan yang luar biasa sehingga menyebabkan perayu mempersoalkan amalan oleh defendan berhubung haknya membuat pengeluaran-pengeluaran itu menurut mandat itu. Oleh itu responden tidak membuktikan apa-apa pelanggaran apa-apa kewajipan berjaga-jaga di pihak bank perayu apabila bank perayu membenarkan pengeluaran-pengeluaran yang dibuat oleh defendan pertama tanpa membuat sebarang inkuiri. Oleh itu, tindakan responden terhadap perayu hendaklah ditolak (lihat perenggan 35).]

Notes

For cases on duty of care, see 1(2) *Mallals' Digest* (4th Ed, 2012 Reissue) paras 2288–2301.

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2006] 5 MLJ 1, FC (refd)

Commissioners of Taxation v English, Scottish and Australian Bank [1920] AC 683, PC (not folld)

Lloyds Bank Ltd v EB Savory & Co [1932] AC 201, HL (not folld)

Proven Development Sdn Bhd v Hongkong and Shanghai Banking Corp [1998] 6 MLJ 150, HC (refd)

Appeal from: Civil Suit No 22–194 of 2004(1) (High Court, Johor Bahru)

R Jayabalan (Kuna Nadasan with him) (Ali Zaitun & Baharudin) for the appelant.

Mathews George (K Mohan with him) (K Mohan & Co) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court of Johor Bahru

given on 6 January 2010. The learned High Court judge had allowed the respondent's (the plaintiff at the High Court) claim against the appellant (the defendant at the High Court) for damages for negligence.

DECISION OF THIS COURT

[2] On 25 June 2012 we unanimously allowed the appeal.

[3] On the facts of the case, we do not find any breach of duty of care on the part of the appellant, as a bank, vis a vis the respondent, its customer.

[4] We shall now elaborate on the grounds of our decision.

THE BACKGROUND

[5] Before the High Court, the respondent/plaintiff, in his writ action, sued three persons, namely:

(a) one Mohd Madzhar bin Mohd Sapuan (as the first defendant);

(b) one Hanizah bt Muhammad (as the second defendant); and

(c) the appellant, Malayan Banking Bhd (as the third defendant).

[6] The first and second defendants were advocates and solicitors, and were sued as partners of a legal firm known as 'Messrs Madzhar Mohd Sapuan & Co'.

[7] The cause of action against the first defendant is the tort of fraud.

[8] From the statement of claim, it is not clear to us what is the cause of action as against the second defendant.

[9] The cause of action against the appellant is for the tort of negligence.

[10] From the notes of the proceedings before the High Court, it appears that only the appellant/third defendant and the respondent/plaintiff participated in the trial before the court. The first and second defendants did not. (However, it is stated in the grounds of judgment of the learned High Court judge and the written submission before us of learned counsel for the appellant that 'default judgment' had been obtained against the first and second defendants.) Thus the trial focused solely on determining as to whether or not the appellant as a bank was liable in negligence to the respondent as its customer for the sums of money withdrawn from his accounts by the first defendant.

[11] It does not appear to be in dispute that the appellant bank owes a duty of care to the respondent, its customer, at the material time.

THE ISSUE

[12] The issue in the appeal before this court is, therefore, only this: whether the appellant bank is guilty of the tort of negligence when it allowed the first defendant to make several withdrawals from the respondent's account.

[13] The learned High Court judge in his grounds of judgment is of the view that the appellant was liable in negligence.

[14] However, with respect, we take a different view.

THE FACTS OF THE CASE

[15] We have earlier pointed out that the first and second defendants were partners in a firm of solicitors.

[16] Now, in 1999 the respondent wanted to refinance the bank loan pertaining to his house. At that time, the house was charged to Bank Bumiputra Malaysia Bhd ('BBMB'), the bank from whom he had taken the housing loan. He now wanted to refinance the purchase of the house with the appellant bank, Malayan Banking. For the purpose of the refinancing, on 6 May 1999, he opened a personal current account with the appellant bank. The first defendant was his solicitor for the purpose of the refinancing transaction.

[17] As part of the refinancing exercise, the respondent obtained a loan of RM500,000 from the appellant bank.

[18] When the respondent opened the personal account with the appellant bank in May 1999, he also around the same time (10 May 1999) issued a mandate to the appellant bank (as well as to the first defendant) authorising the first defendant to operate his personal account. The terms of the mandate are wide and include authorising the first defendant to make withdrawals from the respondent's account. They read:

> I/We … hereby … request you to honour all cheques drawn on the said Account by him … I/We have authorized the said person(s) on my/our behalf … to make draw, accept or otherwise … and I/We hereby acknowledge and hold myself liable thereon in the same way as if they were signed by me/us … This authority shall continue in force until I/We have expressly revoked it by notice in writing delivered to you …

[19] The first defendant utilised RM227,480.13 from the RM500,000 to pay BBMB to redeem the property that was charged to BBMB. There was thus a balance sum of RM272,519.87. This sum, however, was withdrawn from the respondent's account with the appellant bank by the first defendant through several withdrawals all in all amounting to RM272,519.87. When the respondent subsequently discovered these withdrawals, he threatened to lodge a police report.

[20] The respondent and the first defendant, however, subsequently, arrived at a settlement on the matter. The settlement involved them entering into a sale and purchase agreement whereby the first defendant bought the respondent's house at a price of RM800,000. In order to finance this purchase, the first defendant obtained a loan of RM960,000 from Standard Chartered Bank ('SCB'). SCB issued a cashier's order to the appellant bank for RM520,060.93 as the redemption sum (as, after BBMB, the house was then charged to the appellant); and another cashier's order payable to the respondent for RM439,939.07, as the balance sum of the loan. The respondent's cashier order was paid into his account with the appellant.

[21] However, on 16 June 2000, a sum of RM439,439 was transferred from the respondent's account to the first defendant's account under a cheque dated 14 June 2000 issued by the first defendant.

[22] Thereafter, on 19 June 2000, the first defendant made a cash withdrawal of RM500 from the respondent's account, leaving a credit balance of only RM9.83.

[23] On 5 December 2001, the respondent lodged a police report that the first defendant had cheated him.

THE RESPONDENT'S CLAIM

[24] The respondent claimed that he was not aware of the withdrawals by the first defendant. The respondent claimed that the appellant had by negligence allowed the first defendant to misappropriate monies from his account with the appellant. In this action against the appellant, the respondent seeks to recover his losses.

[25] Learned counsel for the respondent in his submission refers to the Federal Court case of *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1 where the Federal Court held (at p 15, para 28):

> [28] To our minds, if a bank executes an order knowing it to be dishonestly given, or shuts its eyes to an obvious fact of dishonesty, or acted recklessly in failing to disclose material facts, the bank will plainly be liable. In our judgment, it is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing customer's orders. See *Barclays Bank plc v Quincare Ltd* [1992] 4 All ER p 363.

THE APPELLANT'S DEFENCE

[26] It is the contention of the appellant that the withdrawals from the respondent's account by the first defendant were all carried out in accordance with the written mandate issued by the respondent to the appellant and the first defendant on 10 May 1999. By this mandate, the first defendant was given full authority to operate the respondent's account. The appellant submitted that there was, therefore, no negligence on its part.

THE FINDINGS OF FACT BY THE HIGH COURT

[27] The learned High Court judge acknowledges the fact that the respondent had given a mandate to the appellant and the first defendant empowering the first defendant to operate the account. The mandate included the authority to issue cheques drawn against the respondent's account, and for the appellant to honour such cheques.

[28] The learned judge also acknowledges that the appellant was contractually bound to obey the respondent's mandate.

[29] However, in respect of the withdrawals totaling RM272,519.87, there were eight cash withdrawals by cheques on 13 May 1999 and 14 May 1999 totaling RM235,611.91. The learned judge was of the view that since the withdrawals took place within a space of just two days and involving a substantial sum, the withdrawals were out of the ordinary and should have caused the appellant to make inquiry with the appellant. In the opinion of the learned judge, the failure to do so on the part of the appellant was a breach of the duty of care.

[30] On the act of the first defendant in transferring the sum of RM439,439 from the respondent's account into his account, the learned judge held:

> The fact that almost immediately after RM439,939.07 was credited into the account RM439,439 was transferred into the first defendant's account ought to have raised doubts in the third defendant's mind leading to the making of an inquiry before the transfer is approved.

THE FINDINGS OF THIS COURT

[31] In our judgment, we agree with the obvious proposition that the appellant had a contractual duty to observe the respondent's unconditional mandate. It is to be recalled that the mandate was given by the respondent to the appellant bank and the first defendant at the time when the respondent opened an account with the appellant bank. We have earlier in this judgment alluded to the terms of the mandate, and we note that they are wide and cover withdrawals by the first defendant of monies from the respondent's account.

[32] It hardly needs stating here that since the appellant was contractually obliged to observe the mandate, thus, any non-observance of the mandate by the appellant bank amounts to a breach of contract by the appellant (see per Arifin Zakaria J (as he then was) in *Proven Development Sdn Bhd v Hongkong and Shanghai Banking Corp* [1998] 6 MLJ 150).

[33] In the present case, with respect, we agree with the submission of learned counsel for the appellant that the appellant cannot question any act carried out by the first defendant under the mandate without proper grounds. In *Abdul Rahim Abdul Hamid*, the Federal Court said (at p 16, para 32):

> [32] … Further, a bank is supposed to treat the customer's mandate at its face value, save in extreme cases. A bank is not obliged to question any transaction which is in accordance with the customer's mandate, unless there are grounds for believing that there was a misuse of authority for the purpose of committing a fraud.

[34] In arriving at his decision that there was a breach of duty of care on the part of the appellant, the learned judge relied on two English cases, namely, *Commissioners of Taxation v English, Scottish and Australian Bank* [1920] AC 683 (PC) and *Lloyds Bank Ltd v EB Savory & Co* [1932] AC 201. However, the two cases were in relation to payment on stolen cheques and did not concern customers' mandate. Hence, these two cases are irrelevant.

CONCLUSION

[35] In our judgment, in the present case, there was no evidence (or sufficient evidence) shown by the respondent of any misuse of authority by the first defendant or of any unusual circumstances to cause the appellant to question the exercise by the defendant of his right to make the withdrawals pursuant to the mandate. Therefore, in our considered view, taking into consideration his own mandate that he had issued, the respondent had not established any breach of any duty of care on the part of the appellant bank when the latter honoured the withdrawals made by the first defendant without making any inquiry. The respondent had only himself to be blamed for the

error of judgment on his part and the consequential misfortune that had befallen on him. The respondent's action against the appellant, therefore, must be dismissed.

[36] Appeal allowed with cost.

Appeal allowed with costs.

Reported by Kohila Nesan